Supreme Court, U.S.
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No. 98-44

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GERALD GEE,

Petitioner,

v.

FREDERICK HUMPHRIES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

Petitioner submits this brief in reply to the brief in opposition ("Opp. Br.") of respondents Humphries, *et al.* Respondents make a number of new points in opposition to the petition; they are either self-refuting or easily rebutted.

A. RESPONDENTS' FACTUAL ASSERTIONS

Respondents' opposition is filled with mischaracterizations of the record; suffice it to note that Gee disputes them and they are irrelevant. The primary factual assertion that respondents make is that the purpose of Gee's speech was not pedagogic, as he claims, but rather "to insult the students as poorly motivated or too lazy to solve th[e] problem" and "to silence their complaining which implicated his own inattention to this problem" (Opp. Br. 1). To enhance this point, respondents misparaphrase the actual speech,[1] redefine its context,[2] and ignore the testimony of their own investigator that she took only what was "common" among the versions of what happened in making *her* determination (*see* Pet. 8) -- the one that President Humphries relied upon in suspending Gee. Plainly, Gee's version of these events did not assert that

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[1] *Compare* Opp. Br. 5 ("the sort of thinking that can keep *us all* on the back of the bus forever" (quoting record) (emphasis added)) *with* Opp. Br. 11 (Gee said "that would keep *them* on the back of the bus" (emphasis added)), 13 (Gee said mentality "was responsible for keeping *the listeners* on the 'back of the bus forever'" (emphasis added)).

[2] Respondents several times suggest that the speech was a private conversation with just a few students. Opp. Br. 11 ("a pre-class conversation with a few students"), 14 (Gee "and a few students were waiting for the commencement of class"). *All* of the complaints that commenced Gavin's investigation of Gee described it as an open class discussion among a number of students (Petition App. E2, E6, E7, and E10), as did Gavin herself in her report (Petition App. J4).

he wanted to insult or silence his students (Pet. App. I), and it would have been rather odd had Gavin actually reached any conclusion about Gee's purpose since she never interviewed Gee at all during her investigation. R.20, p. 41.

In any event, respondents never really make it clear why some uses of the term "nigger" are pedagogic and some are "insults." They simply assert *ipse dixit* that Gee's statement was the latter, and the other uses of the term in the record (*see* Pet. 4-5) were the former. Opp. Br. 10-11. That is hardly the kind of clear explanation normally associated with the term "fair notice."

B. RESPONDENTS' LEGAL ASSERTIONS

Gee was suspended for two weeks because of what he said in class.[3] Nonetheless, respondents claim that this is "not a free speech case at all" (Opp. Br. 12). Their efforts to ignore conflicts among the circuits on the various issues outlined in the petition are similarly far-fetched.

1. First Amendment Issues. -- Gee has shown that the circuits have split on the application of the "public concern" test for in-class or pedagogic speech. Respondents assert that Gee's speech was not pedagogic, and then cite a series of cases plainly involving speech outside of the classroom to show that the conflict does not really

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[3] Respondents go to great lengths to show that Gee's career was in a tailspin and that he would not have received tenure in any event. Opp. Br. 2-3. This, of course, is both disputed and irrelevant to any issue on which Gee seeks review. No one disputes that there was a causal relationship between Gee's speech and (1) his suspension and (2) the report in his file finding him guilty of racial harassment.

exist. None of the cases from the First, Sixth or Tenth Circuits cited in the paragraph on pages 14-15 of respondents' brief involved in-class, pedagogic speech; and no one disputes that the "public concern" test has been applied to non-pedagogic, outside-the-classroom speech.

Thus, respondents' assertion that this case is inappropriate to resolve the conflict about *in-class* speech is dependent upon their assertion that Gee's speech was not pedagogic. Not only is this an inappropriately narrow definition of "pedagogy," it once again, ignores Gavin's own report. Pet. App. J4 ("It was common for the students to discuss topics that concerned them, whether those topics were a part of the lecture or not").

Respondents also assert that the "legitimate pedagogical concern" test in the First Circuit is the same as the "public concern" test applied elsewhere (and thus there is no conflict). Opp. Br. 15-16. *See also id.* at 20 (if speech could not meet "public concern" test, it could not have met "legitimate pedagogical concern" test of *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)). But this is just plain wrong. The "public concern" test is a test applied to the *speech itself*, to determine if it is at all protected; it weighs the *public employee's* interest. The "legitimate pedagogical concern" test is a test applied to *regulations of speech* by a school; it weighs the *school's* (or the *State's*) interest. They are separate tests, and their co-existence hardly disproves the fact of a conflict in the application of one of them.

With respect to the "fair notice" requirement of the First Amendment, respondents claim that there is no conflict between the decision of the court below and the Ninth Circuit's decision in *Cohen v. San Bernardino Valley*

College, 92 F.3d 968 (9th Cir. 1996) because the latter turned upon "a unique set of facts." Opp. Br. 18. Specifically, respondents assert that the court in *Cohen*

> noted that the University had *permitted* the instructor to teach in this manner for years without a finding that this conduct was in violation of the rule. The court was critical of the change in enforcement and the inconsistent interpretation of the rule.

Opp. Br. 18 (emphasis added). One can search in vain in *Cohen* for anything resembling these assertions because respondents have simply made them up. In fact, the repeated, long-term conduct involved in *Cohen* suggests, if anything, that the conduct should have been far more likely to be characterized as "severe" and "pervasive." That the Ninth Circuit held that it did not clearly come within the school's definition of "sexual harassment" only underscores the conflict between that case and this one.

Finally, respondents assert that this Court can ignore the different balancing tests of *Pickering* and *Hazelwood* being applied by the lower courts because Gee "failed the *Pickering* balancing test" (Opp. Br. 20). But neither of the Courts below reached any balancing test.

2. Procedural Due Process. -- Respondents spend much effort demonstrating that Gee did, in fact, have additional state remedies after President Humphries suspended him (with less than one week's notice). Opp. Br. 21-23. Gee obviously disputes that (*see* Pet. 29 n.9), but it is once again irrelevant to the question he has asked: assuming he did have such options, is the State deprivation of property "incomplete" until he has used all of them?

Respondents' efforts to show that there is no conflict among the circuits on this question are frivolous. Indeed, their primary argument seems to be that the Eleventh Circuit's decisions[4] have *not* applied the "random" and "unauthorized" limitation on *Parratt v. Taylor*, 451 U.S. 527 (1981) that the other circuits (and this Court) have applied. *E.g.*, Opp. Br. 26 ("the court in *McKinney* made absolutely no reference to [the "random" and "unauthorized"] distinction, nor did it make this a basis of its decision"), 28 ("whether the *Parratt* analysis applies to actions by high ranking officials acting within the scope of their authority . . . was not mentioned by the Eleventh Circuit in *McKinney*"). That the Eleventh Circuit ignores standards that other circuits deem relevant is a powerful argument *for* granting Gee's petition, not against it.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, this Court should grant the petition.

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[4] It is unclear what point respondents wish to make with their argument that cases in the Eleventh Circuit subsequent to *McKinney v. Pate* (including this one) did not expand, but simply applied, that precedent. Opp. Br. 23-24. In either case, the Eleventh Circuit requires a plaintiff to utilize all possible state remedies before a deprivation of property is deemed to have been by the state. Whether that is called an "exhaustion" requirement or something else (Opp. Br. 24) hardly changes the substantive result.